

DUPLICATE ORIGINALS AND THE BEST EVIDENCE RULE

Chrismer v Chrismer,
103 Ohio App. 23, 144 N.E.2d 494 (1956)

The plaintiffs were the payees of a promissory note executed by the defendant-maker. The maker requested that two identical notes be made, and this was done with the aid of carbon paper. The maker took the original and the payees retained the carbon copy. As the executor of the defendant-maker's estate was unable to produce the original note, the plaintiffs were allowed to introduce their copy into evidence without accounting for the original. The defendant objected on the grounds that the plaintiffs failed to lay a proper foundation for the introduction of their copy as the best evidence. The appellate court affirmed the trial court's decision that the carbon was secondary evidence and therefore not properly introduced.¹

The *Chrismer* case is one of first impression in Ohio.² The real issue in this case was whether under the best evidence rule the carbon-made note could be regarded as primary evidence of the transaction between the parties. Although there is some disagreement as to the application of the best evidence rule,³ most modern writers adopt the view that it is shorthand for the rule requiring the production of the original document.⁴ Historically, the original document rule was

¹ *Chrismer v. Chrismer*, 103 Ohio App. 23, 144 N.E.2d 494 (1956), reversed and remanded for new trial. Although the appellant court agreed the note was secondary evidence, the court held prejudicial error was committed by rejecting the note upon the final submission of the case to the court.

² The court in this case held that a carbon copy of a promissory note is not a negotiable instrument. OHIO REV. CODE §1301.03 (1953). This Note will not discuss the question of negotiability as this does not bear upon the operation of the best evidence rule. *International Harvester Co. v. Elfstrom*, 101 Minn. 263, 112 N.W. 252 (1907). A copy of a promissory note was held to be secondary evidence in *Struam v. Klaurens*, 140 Neb. 830, 2 N.W.2d 319 (1942); *Brown v. Van Tuyl*, 40 Wash. 2d 364, 242 P.2d 1021 (1952). It should be noted that the issue of negotiability was not directly before the court since the action was between the parties to the original agreement. *Wurlitzer Co. v. Dickinson*, 247 Ill. 27, 93 N.E. 132 (1910).

³ The term "best evidence" first appeared in the case of *Ford v. Hopkins*, 1 Salk 283, 91 Eng. Rep. 250 (1699). This phrase was subsequently applied by some of the earlier writers starting with Lord Gilbert in 1726 to mean the "utmost proof the nature of the case is susceptible." For an historical development see 4 WIGMORE, EVIDENCE §1173 (3d ed. 1940). Some of our courts have followed this application *e.g.*, *Gay v. United States*, 118 F.2d 160 (7th Cir. 1941); *Pettit v. Campbell*, 149 S.W.2d 633 (Tex. Civ. App. 1941).

⁴ *Michigan Banker's Ass'n. v. Ocean Acc. & Guarantee Corp.*, 274 Mich. 470, 264 N.W.868 (1936). THAYER, PRELIMINARY TREATISE ON EVIDENCE 489 (1898) stated: "Indeed it (best evidence) would probably have dropped naturally out of use long ago, if it had not come to be a convenient, short descrip-

developed to protect against inaccuracy and fraud in proving the terms of a particular writing.⁵

In the majority of cases it is not difficult to determine which terms are the ones to be proved, or to distinguish the original writing from other evidence of the terms. More difficult are the cases where it is contended that duplicate originals were executed. The courts have recognized that "duplicate originals" have the same evidentiary status as an original writing.⁶

The "duplicate" in legal conception is an original instrument repeated.⁷ This is illustrated in the cases where a carbon impression is simultaneously produced by the same stroke that creates the original. In that instance the legal act embraces all the writings and the courts have received each writing as the original.⁸

A duplicate original exists when the parties intend the writing to have such effect. Frequently the courts become so concerned with the operational mechanics that they fail to consider the effect the parties gave to the particular writing. This is particularly evident in the cases dealing with photostats and photographs.⁹ Fundamentally, the courts should first look to see if the parties wanted a writing to be an original. The rule is designed to protect the parties and they should be able to control its application regardless of the wisdom of their own act.

Some courts have looked for an express intent to have carbon copies function as an original.¹⁰ Many of the courts however receive carbons as duplicate originals unless there appears to be an express intent to the contrary.¹¹ In the present case the plaintiffs' evidence tended to show the maker expressly stated he wanted two notes representing his indebtedness. Since it appears that both writings were intended to repre-

tion of the rule as to proving the contents of a writing." 4 WIGMORE, EVIDENCE §1174; 1 JONES, EVIDENCE §§199-200 (4th ed. 1938); Note, *The Best Evidence Rule—A Criticism*, 3 NEWARK L. REV. 200 (1938).

⁵ For a complete historical development see 4 WIGMORE, EVIDENCE §§1177-1179; 1 JONES, EVIDENCE §199.

⁶ 4 WIGMORE, EVIDENCE §1234; MCCORMICK, EVIDENCE §206 (Hornbook 1954); 1 JONES, EVIDENCE §209.

⁷ *Schroer v. Schroer*, 248 S.W.2d 617 (S.Ct. Mo. 1952).

⁸ *Wurlitzer Co. v. Dickinson*, *supra* note 2; *Oberlin v. Pyle*, 114 Ind. App. 21, 49 N.E.2d 970 (1943); *Gus Dattilo Fruit Co. v. Louisville & N. R. Co.*, 238 Ky. 322, 37 S.W.2d 856 (1931); *International Harvester Co. v. Elfstrom*, *supra* note 2, Annot., 51 A.L.R. 1498 (1927); see also *supra* note 6.

⁹ See *infra* note 26.

¹⁰ *Tampa Shipbuilding & E. Co. v. General Construction Co.*, 43 F.2d 309 311 (5th Cir. 1930) stated: "Duplicates exist only when two instruments have both been recognized and established by the parties concerned as evidence of their act." *Lockwood v. L. L. Freight Lines*, 126 Fla. 474, 171 So. 236 (1936). *Mauritz v. Schwind*, 101 S.W.2d 1085 (Tex. Civ. App. 1937); MCCORMICK, EVIDENCE §206.

¹¹ "A growing number of courts today treat all carbons, when authenticated as true reproductions, as if they were duplicate originals. . . ." MCCORMICK, EVIDENCE §206, at 420; 1 JONES, EVIDENCE §209; see *supra* note 8.

sent the transaction, the plaintiffs' carbon should have been admitted as a duplicate original.

The cases indicate that the duplicate original doctrine is not governed solely by the intent of the parties. The courts also look to the time and manner in which the writings are brought into existence. The usual approach in evaluating a writing as either an original or a copy is to determine whether the writing was created simultaneously with the original.

Today mechanical reproductions are mainly done by use of carbons. One of the most frequently cited cases for the application of the duplicate original doctrine to carbon copies is *International Harvester v. Elfstrom*.¹² The court in reference to the admission of a carbon copy without accounting for the original said:

If the reproduction is complete there is no practical reason why all the products of the single act of writing the contract and affixing a signature thereto should not be regarded as of equal value. In this instance the same stroke produced both signatures.¹³

The Ohio court did not accept the reasoning of the *International Harvester* case. Not all of the courts have accepted this view with respect to carbon copies.¹⁴ Nevertheless, many jurisdictions have applied the duplicate original doctrine to carbon-made writings such as letters,¹⁵ sales slips,¹⁶ reports,¹⁷ assignments,¹⁸ bills of lading,¹⁹ deposit slips,²⁰ contracts,²¹ leases,²² and other types of written documents.²³

¹² *Supra* note 2.

¹³ *Id.* at 264, 112 N.W. at 253.

¹⁴ See cases collected in 1 JONES, EVIDENCE §209; 20 AM. JUR., *Evidence* §390 (1939).

¹⁵ *General Life Ins. Co. v. Carter*, 52 N.E.2d 509 (Ind. App. 1944) *rev'd on other grounds*, 222 Ind. 557, 54 N.E.2d 944 (1944); *Liberty Nat'l Bank & Trust Co., v. Louisville Trust Co.*, 295 Ky. 825, 175 S.W.2d 524 (1943); *Hay v. Am. Fire Clay Co.*, 179 Mo. App. 567, 162 S.W. 666 (1913); for cases *contra* see *supra* note 10.

¹⁶ *Douglas v. Parker Commercial Co.*, 28 Ariz. 47, 235 Pac. 148 (1925); *Spottiswood v. Weir*, 66 Cal. 525, 6 Pac. 381 (1885); *Morrow v. State*, 190 Md. 559, 59 A.2d 325 (1948); *Wurlitzer Co. v. Dickinson*, *supra* note 2; *State v. Albertalli* 78 N.J.L. 90, 73 Atl. 128 (1909).

¹⁷ *Gus Dattilo Fruit Co. v. Louisville*, *supra* note 8; *Oberlin v. Pyle*, *supra* note 8; *State v. Stockton*, 38 Tenn. App. 90, 270 S.W.2d 586 (1954).

¹⁸ *Carter v. Carl Merveldt & Sons*, 183 Okla. 152, 80 P.2d 254 (1938); *Maston v. Glen Lumber Co.*, 65 Okla. 80, 163 Pac. 128 (1917).

¹⁹ *Louisville & N. R. Co. v. Gibson*, 294 Ky. 55, 170 S.W.2d 907 (1943); *Walker v. So. R. Co.*, 76 S.C. 308, 56 S.E. 952 (1907).

²⁰ *Schroer v. Schroer*, *supra* note 7.

²¹ *International Harvester Co. v. Elfstrom*, *supra* note 2; *Stern Equipment Co., Inc. v. Portell*, 116 A.2d 601 (D.C.Mun. App. 1955); *Quinn v. Standard Oil Co.*, 249 Mass. 194, 144 N.E. 53 (1924); *Parodi v. Universal Ins. Co.*, 128 N.J.L. 433, 26 A.2d 557 (1942).

The courts have almost consistently held that those writings created subsequent to the original are merely secondary evidence of the terms. Thus letter press copies,²⁴ hand-copies,²⁵ and photostats and photographs²⁶ have been held inadmissible if the original is available and can be produced. This indicates that an arbitrary time line has been drawn to separate the originals from the copies.

The courts in applying the duplicate original doctrine have failed to define adequately the term "original." If "original" includes only those writings the parties intend to be originals, then the reliability of the reproduced writing is important only as an element in proving intent. Thus a photograph could not be primary evidence if the parties did not intend it to be an original. If "original" includes those writings which are as accurate as the original then the reliability of the reproduced writing is of utmost importance. With this approach, a photostat upon proper authentication might well be received as primary evidence of the terms of a writing.

The application of the best evidence rule is further complicated by the term "best evidence." This term is misleading because it does not necessarily refer to the most convincing evidence capable of being produced.²⁷ The fact that "best evidence" has been superimposed upon the original document rule has resulted in some courts excluding reliable reproductions because they were not the best possible evidence available. This is illustrated by several of the cases refusing admission to photostats or photographs.²⁸

²² Carroll v. Peake, 1 Pet. 18 (1828); Peaks v. Cobb, 192 Mass. 196, 77 N.E. 881 (1906).

²³ Robinson v. State, 38 Ala. App. 315, 82 So. 2d 815 (1955) (a signed confession); Campbell v. Pure Oil Co., 92 Ga. App. 523, 88 S.E.2d 630 (1955) (notice of discharge); for further cases see Annot. 51 A.L.R. 1498 (1927).

²⁴ Nodin v. Murray, 3 Camp. 228, 170 Eng. Rep. 1363 (1812); Federal Union Surety Co. v. Indiana Lumber & Mfg. Co., 176 Ind. 328, 95 N.E. 1104 (1911); Falardeau v. Smith, 13 Ohio C.C.R. (n.s.) 268 (1909); a more liberal attitude was taken in McAuley v. Siscoe, 110 Kans. 804, 205 Pac. 346 (1922) which states: "Modern ways of doing business and modern inventions necessarily modified the rigidity of ancient rules of evidence touching correspondence." For cases distinguishing the letter press see Spottiswood v. Weir, *supra* note 16; International Harvester Co. v. Elfstrom, *supra* note 2.

²⁵ 4 WIGMORE, EVIDENCE §1273.

²⁶ Hosey v. Southport Petroleum Co., 244 Ala. 45, 12 So. 2d 93 (1943); Olsen v. N.Y. Life Ins. Co., 299 Iowa 1075, 295 N.W. 833 (1941); People v. Wells, 380 Ill. 347, 44 N.E.2d 32 (1942); for a collection of cases see Annot. 142 A.L.R. 1262 (1942); *contra*, Leathers v. Salvor Wrecking & Transp. Co., 2 Woods 680 (1875). Most of these cases talk in terms of reliability rather than intent.

²⁷ Because the term "best evidence" has no practical utility many writers agree the sooner the phrase is abandoned the better. See *supra* note 4.

²⁸ People v. Wells, *supra* note 26; Union Cent. Life Ins. Co. v. Mendenhall, 183 Ark. 25, 34 S.W.2d 1078 (1931); Wilson v. Glens Falls Ins. Co., 309 Ill. App. 286, 32 N.E.2d 961 (1941); Black Mountain Corp. v. Parsons, 277 Ky. 486, 126 S.W.2d 874 (1939).

At the inception of the original document rule, there were no means of reproduction more reliable than hand copying. Consequently, the best evidence that could be introduced to carry out the purpose of the rule was the original writing itself.²⁹ Today this exclusionary rule should still refuse preference to memory testimony, hand-copies, and other written evidence which common experience has shown to be less trustworthy. On the other hand when error, fraud, or imposition are not to be feared from a reproduced writing there is no reason to demand production of the original.³⁰ In that case the reproduction is an original.

Although the courts do not rest the duplicate original doctrine solely on the intent of the parties, they fail to evaluate realistically the evidentiary quality of certain types of writings. This has resulted in the illogical situation of preferring carbon copies over photostats or photographs. The latter processes of reproduction make the writings as reliable as the original. As long as the photostat or photograph is readable, it will bear the same words as the writing from which it was taken. The reliability of these methods of reproduction has been recognized in various legislative enactments.³¹

The courts must recognize that the best evidence rule gives preference to those writings which the parties intend to be originals and those writings which are as reliable as the original. Either approach should have upheld the plaintiffs' copy in the present case as admissible without accounting for the original note. The courts must also begin to evaluate logically the reliability of each writing introduced into evidence.³² The rigidity of the existing categories of reliability must be modified if the best evidence rule is to be properly applied to future cases. Modern day methods and needs demand the re-evaluation and clarification of this restrictive rule of evidence.

Joanne Wharton

²⁹ Fear of inaccuracy of a letter press copy was stated by Lord Ellenborough in *Nodin v. Murray*, *supra* note 24, although he did recognize it as more reliable than a copy taken by successive imitations; *Steyner v. Droitwich*, *Skinner* 623, 90 Eng. Rep. 280 (1696); see *supra* note 5.

³⁰ *Gus Dattilo Fruits Co. v. Louisville*, *supra* note 8; *United States v. Manton*, 107 F.2d 834 (2d Cir. 1938).

³¹ Federal Business Records Act, 49 STAT. 1561 (1932), 28 U.S.C. §1732 (1952). See also UNIFORM BUSINESS RECORDS AS EVIDENCE ACT, 9A U.L.A. 299 (1957); OHIO REV. CODE §§2317.40-41 (1953); PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT, 9A U.L.A. 334 (1957, adopted by 32 states.

³² In evaluating this rule the courts should look to the whole process of judicial proof. See Note, *supra* note 4; WIGMORE, THE SCIENCE OF JUDICIAL PROOF §1 (3d ed. 1947); Michael, Book Review, 33 COL. L. REV. 770 (1933); McCORMICK, EVIDENCE §206 suggests that all mechanically produced copies upon authentication as accurate reproductions should come in unless the court in its discretion requires the original. In this context see *Priddy-Maer Elevator Co. v. Wenzel*, 120 Kan. 423, 243 Pac. 1016 (1926).